

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FORD MOTOR CREDIT COMPANY,

Plaintiff,

v.

NO. CIV. S-04-2344 LKK/JFM

MICHAEL DAUGHERTY,

Defendant.

AND RELATED COUNTER-CLAIM AND
THIRD-PARTY COMPLAINT.

The matter is before the court on two motions to dismiss, one filed by plaintiff and counter-defendant Ford Motor Credit Company ("Ford Credit"), and one filed by third-party defendant Ford Motor Company, Lincoln Mercury Division ("Lincoln Mercury"). In the underlying suit, Ford Credit brings two breach of guaranty claims against defendant Michael Daugherty, alleging that Daugherty induced it to enter into a wholesale agreement and a capital loan and promissory note by promising full payment, but that Daugherty breached these guaranty agreements. Compl. at 2-6. Daugherty answered and filed a counterclaim against Ford Credit. Daugherty

1 and Daugherty Lincoln-Mercury Inc. ("DLMI") also bring a third-
2 party suit against Lincoln Mercury.¹

3 In April 2005, Ford Credit moved to dismiss a number of causes
4 of actions alleged in Daugherty's second amended counterclaim. On
5 May 27, 2005, the court denied Ford Credit's motions directed to
6 the third, fourth, fifth, sixth, and seventh causes of action. The
7 court dismissed defendants' ninth and fourteenth causes of action
8 without prejudice. Daugherty subsequently filed a third amended
9 counterclaim against Ford Credit and Daugherty and DLMI filed a
10 third-party action against Lincoln Mercury.

11 In September 2005, third-party defendant Lincoln Mercury filed
12 a motion for judgment on the pleadings. On October 31, 2005, the
13 court dismissed without prejudice claims one through six of
14 defendants' counterclaim. The court dismissed with prejudice
15 claims eight and nine.² Lincoln Mercury argued that Daugherty
16 raised identical factual allegations in their third amended
17 complaint as were raised and decided in an administrative hearing
18 before the California New Motor Vehicle Board ("NMVB"), and were
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20 ¹ In earlier rounds of briefing, Daugherty referred to Ford
21 Credit and Lincoln Mercury as counterclaim defendants, even though
22 Lincoln was not a party in the original suit. Consequently, the
23 court ordered defendant to file a third-party suit against Lincoln
24 Mercury if it wished to have Lincoln Mercury as a party to the
25 suit. Thus, DLMI is the third-party plaintiff. However, because
26 the parties continue to refer to Daugherty and DLMI as defendants,
the court will do so for purposes of this motion.

² Claims eight and nine, brought under the California Motor
Vehicle Code, were dismissed on May 27, 2005 with prejudice because
Daugherty failed to raise any new factual allegations. See October
31, 2005 Order at 13-15.

1 thus collaterally barred from bringing such counterclaims.

2 On November 14, 2005, defendants filed a fourth amended answer
3 and amended third-party complaint against Lincoln Mercury and
4 amended counterclaim against Ford Credit. The fourth amended
5 counterclaim reasserts a number of claims that were previously
6 dismissed: Breach of Contract (first claim), Breach of the
7 Covenant of Good Faith and Fair Dealings (second claim), Unfair
8 Business Practices (third claim), Interference with Contractual
9 Relations (fourth claim), Interference with Prospective Business
10 Advantage (fifth claim), and Misrepresentation/Deceit/Fraud (sixth
11 claim). Daugherty also alleges Negligent Misrepresentation
12 (seventh claim),³ which was not challenged by third-party defendant
13 previously, as well as three claims brought only against Ford
14 Credit: fraud as a release from guaranty (eighth claim), Violation
15 of continuing guarantees (ninth claim), and violation of California
16 Civil Code § 2819 (twelfth claim).⁴ Pending before this court are
17 Ford Credit's and Lincoln Mercury's motions to dismiss defendants'
18 counterclaims.⁵

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22 ³ Claims one through seven are brought against both Ford
23 Credit and Lincoln Mercury.

24 ⁴ There are no tenth and eleventh claims.

25 ⁵ Ford Credit moves to dismiss every claim brought against
26 it (1-7, 8, 9, 12), and Lincoln Mercury moves to dismiss every
claim brought against it (1-7).

I.

BACKGROUND FACTS⁶

The court has set forth the background facts multiple times before, but repeats them here because they bear on the instant motion. Suffice it to say that in 1999, Daugherty, owner of DLMI, executed a buy-sell agreement for the purchase of a Lincoln Mercury dealership to be operated in Sacramento, California. DLMI was enfranchised by Lincoln Mercury as a dealer under three separate franchise agreements. During the course of operations, DLMI entered into various financing arrangements with Ford Credit including an agreement for a capitalization loan and a separate agreement for wholesale flooring for DLMI's new vehicle inventory. Daugherty executed personal guarantees for these financial commitments of DLMI.

According to DLMI, on or about December 1, 2001, as a result of the fraudulent actions of Lincoln Mercury and Ford Credit, DLMI was forced to cease its Lincoln and Mercury sales operations. Daugherty claims that DLMI relied upon the representations of Lincoln Mercury to order a number of vehicles to be built and delivered by Lincoln Mercury. Lincoln Mercury, however, contends that DLMI ordered an excess number of cars to sell and the demise of DLMI's credit line as well as the termination of the franchise was due to DLMI's conduct, not Lincoln Mercury.

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⁶ Background facts are derived primarily from the court's previous order.

1 On January 23, 2002, Lincoln Mercury notified DLMI that it
2 intended to terminate DLMI's Lincoln and Mercury franchise
3 agreements. DLMI then filed a protest with the California New
4 Motor Vehicle Board, pursuant to the provisions of California
5 Vehicle Code Section 3060, protesting the proposed termination of
6 its franchises. On or about April 17, 2002, DLMI filed a separate
7 petition with the Board, pursuant to the provisions of Section
8 3050(c), alleging that DLMI sustained damage as a result of the
9 conduct of Lincoln Mercury in delivering unwanted and unordered
10 vehicles to DLMI. The petition included claims that Lincoln
11 Mercury was liable to DLMI on several causes of action.

12 The hearing on the protest and petition was scheduled to
13 commence on January 6, 2003, before an administrative law judge
14 ("ALJ"). The ALJ discussed the impact of the then recent opinion
15 from the First District Court of Appeal in the matter of
16 Greenlining Institute vs. Public Utilities Commission, 103
17 Cal.App.4th 1324 (2002). The ALJ determined that the Greenlining
18 case cast serious doubt upon whether the Board had jurisdiction to
19 consider the issues raised by the petition and granted DLMI's
20 motion to sever the protest and petition and proceed to hearing on
21 the protest only. The ALJ reasoned that this decision suspended
22 the proceedings initiated by the petition "pending the outcome of
23 whatever action Daugherty chose to pursue in civil court as to the
24 allegations contained in the petition." NMVB Decision at 5.

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1 **A. THE DECISION OF THE NEW MOTOR VEHICLE BOARD**

2 The ALJ heard evidence on the termination protest on January
3 7 and 9, 2003. On April 24, 2003, the Board adopted the proposed
4 decision of the ALJ. The specific issue pending before the Board
5 was "whether Lincoln Mercury has good cause for the termination of
6 Daugherty's Lincoln and Mercury Franchises." NMVB Decision at 5.⁷
7 Pursuant to section 3066(b), Lincoln Mercury had the burden of
8 establishing good cause for the termination of the franchise.

9 The ALJ made two findings of fact. First, the ALJ determined
10 that Daugherty did in fact order the additional cars to sell (a
11 fact DLMI contests in this litigation). Specifically, the ALJ
12 concluded that there was no doubt that Daugherty was aware that the
13 vehicles were being ordered to be built and delivered and that
14 Daugherty not only desired them but required them in order to stay
15 operational. NMVB Decision at 24. Second, the ALJ concluded
16 that Lincoln Mercury had "established that Daugherty was not and
17 is not conducting an adequate amount of business as compared to the
18 business available to it." Id. at 26. The ALJ explicitly stated
19 that "the cessation of business by Daugherty was not caused by
20 conduct of representatives of Lincoln Mercury." Id. at 27. Once
21 the Board found that good cause had been established for the
22 termination of the DLMI franchise, DLMI petitioned the Sacramento
23

24 ⁷ In making this determination, the ALJ considered factors
25 such as the amount of business transacted by the franchisee, the
26 permanency of the investment, whether it is injurious to the public
 for the franchise to be modified, and whether the franchisee failed
 to fulfill the warranty obligations, to name a few.

1 County Superior Court for a writ of administrative mandamus
2 pursuant to Code of Civil Procedure Section 1094.5. This writ was
3 denied by the Superior Court.

4 **II.**

5 **DISMISSAL STANDARDS UNDER FED. R. CIV. P. 12(b)(6)**

6 On a motion to dismiss, the allegations of the complaint must
7 be accepted as true. See Cruz v. Beto, 405 U.S. 319, 322 (1972).
8 The court is bound to give the plaintiff the benefit of every
9 reasonable inference to be drawn from the "well-pleaded"
10 allegations of the complaint. See Retail Clerks Intern. Ass'n,
11 Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963).
12 Thus, the plaintiff need not necessarily plead a particular fact
13 if that fact is a reasonable inference from facts properly alleged.
14 See id.; see also Wheeldin v. Wheeler, 373 U.S. 647, 648 (1963)
15 (inferring fact from allegations of complaint).

16 In general, the complaint is construed favorably to the
17 pleader. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). So
18 construed, the court may not dismiss the complaint for failure to
19 state a claim unless it appears beyond doubt that the plaintiff can
20 prove no set of facts in support of the claim which would entitle
21 him or her to relief. See Hishon v. King & Spalding, 467 U.S. 69,
22 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).
23 In spite of the deference the court is bound to pay to the
24 plaintiff's allegations, however, it is not proper for the court
25 to assume that "the [plaintiff] can prove facts which [he or she]
26 has not alleged, or that the defendants have violated the . . .

1 laws in ways that have not been alleged." Associated General
2 Contractors of California, Inc. v. California State Council of
3 Carpenters, 459 U.S. 519, 526 (1983).

4 **III.**

5 **ANALYSIS**

6 _____Daugherty and DLMI have filed an amended counterclaim and
7 third-party complaint subsequent to the court's previous
8 application of collateral estoppel which resulted in the dismissal
9 of six of their claims. Although Ford Credit and Lincoln Mercury
10 argue that Daugherty's new allegations are barred by collateral
11 estoppel, some claims must be sustained because Daugherty and DLMI
12 have alleged new facts which fall outside the purview of the NMVB's
13 decision.⁸

14 **A. CLAIMS ONE THROUGH SIX (AGAINST FORD CREDIT AND**
15 **LINCOLN MERCURY)**

16 The court's October 2005 order explained that collateral
17 estoppel applied to decisions made by administrative agencies,
18 including the NMVB decision. October 31, 2005 Order at 8. As to
19 the six causes of action, the court explained that each claim
20

21 ⁸ The court notes that third-party defendant Ford Credit is
22 able to enforce the findings from the NMVB's ruling. As it points
23 out, the California Supreme Court has held that collateral estoppel
24 may be applied in favor of a party who was not involved in the
25 prior action. See Bernhad v. Bank of America, 19 Cal.2d 807
26 (1942). Although Ford Credit was not a party in the NMVB
proceedings, they were directly implicated in the NMVB's findings,
and the proceedings involved the same transactions. As put by the
California Supreme Court in Bernhard, "it would be unjust to permit
one who has had his day in court to reopen identical issues by
merely switching adversaries." 19 Cal.2d at 812.

1 "rel[ied] on the allegation that Lincoln Mercury and Ford Credit
2 secretly arranged for ordering and shipping an excess number of
3 cars and that it was those actions of Lincoln Mercury and Ford
4 Credit that caused the DLMI franchise to fail." Id. Ford Credit
5 and Lincoln Mercury urge the court to dismiss Daugherty's and
6 DLMI's claims here because they contend that Daugherty and DLMI
7 raise issues related to unordered and unwanted vehicles which the
8 NMVB already adjudicated.

9 Daugherty and DLMI, on the other hand, argue that their
10 counterclaims and third-party claims should not be dismissed
11 because even though the Board determined that Daugherty was aware
12 of the additional vehicles being built and delivered, the Board
13 never made findings as to "the reason that these vehicles were
14 ordered." Opp'n at 4. Defendants cite to various paragraphs in
15 the fourth amended counterclaim where they allege that they ordered
16 the vehicles because they "relied on representations" of Lincoln
17 Mercury regarding the market share for Lincoln Mercury vehicles
18 which were false and "in excess of the potential for sales." Opp'n
19 at 4, citing FAC ¶¶ 54, 58, 59. Defendants' arguments are well-
20 taken.

21 The court has closely examined DLMI's and Daugherty's fourth
22 counterclaim and third-party complaint and there are new
23 allegations relating to Lincoln Mercury's misrepresentation of the
24 market share, which the NMVB did not consider. These allegations
25 are contained in the general allegations and in claims two, three,
26 and six.

1 Specifically, Daugherty and DLMI allege that:

2 "[R]epresentatives of Lincoln Mercury . . . made a
3 number of representations concerning the expected sales
4 of new Lincoln and Mercury vehicles in the Sacramento
5 Market." See ¶ 54.

6 "[R]epresentations proved to be far in excess of the
7 potential for sales of new Lincoln and Mercury vehicles
8 in the Sacramento market." See ¶ 59.

9 "Lincoln Mercury "represent[ed] to DLMI the market
10 potential for the sales of . . . vehicles . . . in an
11 amount far in excess of the actual sales potential." See
12 ¶ 78, second claim (breach of covenant of good faith and
13 fair dealing)

14 "Lincoln Mercury deliberately misrepresent[ed] to DLMI
15 the sales potential for Lincoln Mercury vehicles in the
16 Sacramento area." See ¶ 86, third claim (Business & Prof
17 Code)

18 "Lincoln Mercury "engaged in a course of conduct . . .
19 designed to deceive DLMI as to the number of vehicles it
20 could reasonably be expected to sell")6. See ¶ 116,
21 sixth claim (Misrepresentation/Deceit/Fraud)

22 Lincoln Mercury and Ford Credit point out that the NMVB
23 considered the ordering process when they concluded that Daugherty
24 did order the vehicles. The record reflects that the Board heard
25 evidence suggesting that Daugherty and Lincoln Mercury
26 representatives met and that the representatives presented sales
forecasts to DLMI. Hearing Tr. at 328.⁹ As Daugherty and DLMI
assert, however, the Board focused on whether Lincoln Mercury had

23 ⁹ The transcript indicates that the sales forecasts were
24 generated, in part, by considering Daugherty's inventory and
25 previous sales figure. Tr. at 328:13-19. Daugherty also testified
26 that based on these meetings, where he was present, both the dealer
and manufacturer could determine the appropriate number of vehicles
to be built by the manufacturer. Tr. at 328-329. The issue here,
however, is estoppel, not the merits.

1 good cause for the termination of Daugherty's Lincoln and Mercury
2 franchises. NMVB Decision at 5, 27. The Board did not consider
3 any alleged fraud or misrepresentations concerning sales potentials
4 which may have led Daugherty to order excess vehicles from Lincoln
5 Mercury. Nor did the parties tender such evidence to the Board.
6 As Daugherty and DLMI point out, the Board's findings were confined
7 to "the vehicle ordering system and claims made by DLMI that
8 Lincoln Mercury delivered vehicles that were never ordered," not
9 whether Lincoln Mercury made representations which resulted in
10 vehicles being ordered far in excess of the potential for sales in
11 the Sacramento market. Opp'n at 4-5.

12 Accordingly, the court sustains claims two, three, and six as
13 to Lincoln Mercury, which contain allegations concerning false
14 representations made by Lincoln Mercury that caused Daugherty and
15 DLMI to order excess vehicles.¹⁰ Claims one, four, and five must
16 be dismissed with prejudice because they do not contain any
17 allegations which distinguish them from the claims which the court

18
19 ¹⁰ The court wishes to be clear as to why it previously
20 dismissed the third claim brought by Daugherty and DLMI under
21 California Business and Professions Code § 17200 in its October 31,
22 2005 order. The court recognizes that the administrative law judge
23 severed the protest of the termination of the franchise from the
24 petition, in part because Greenlining Institute v. The Public
25 Utilities Commission of the State of California, 103 Cal.App.4th
26 1324 (2002), called into doubt whether the Board could properly
adjudicate the 17200 claim. The court dismissed the Section 17200
claim in its previous order because that claim contained
allegations only relating to whether the cessation of Daugherty's
business was caused by Lincoln Mercury and Ford, an issue that was
previously decided by the NMVB. In this round of briefing, DLMI
and Daugherty allege in the 17200 claim that Lincoln Mercury
misrepresented the market share to them, new claims that were not
before the NMVB.

1 previously dismissed. Claims one through six must be dismissed as
2 to Ford Credit because they do not contain allegations relating to
3 Ford Credit making any misrepresentations to Daugherty and DLMI
4 about the market potential of the vehicles.¹¹

5 **B. SEVENTH CLAIM - NEGLIGENT MISREPRESENTATION (AGAINST**
6 **FORD CREDIT AND LINCOLN MERCURY)**

7 In the previous motion for judgment on the pleadings, Lincoln
8 Mercury did not move to dismiss this claim. In this round of
9 briefing, both Ford Credit and Lincoln Mercury argue that this
10 claim, too, necessarily contradicts factual findings determined by
11 the NMVB. Their argument does not lie.

12 According to DLMI and Daugherty, Lincoln Mercury "represented
13 to DLMI inflated sales forecasts" and "Ford Credit knew or should
14 have known . . . that the representations . . . were false when
15 made." FAC ¶¶ 127, 129. Defendants allege that these
16 representations were made so that Lincoln Mercury could
17 "enfranchise" another dealer to replace DLMI. *Id.* at ¶ 130. DLMI
18 and Daugherty maintain that Ford Credit and Lincoln Mercury
19 "inflat[ed] the estimates of potential sales to dealer candidates."
20 The court must sustain the negligent misrepresentation claim
21 because, as noted above, such allegations concerning Lincoln
22 Mercury's representations about the market share were not issues
23 pending before the Board.

24
25 ¹¹ While DLMI and Daugherty assert in these six claims that
26 Ford Credit illegally increased DLMI's credit line without its
consent, these factual allegations are foreclosed by the NMVB's
decision. See October 31, 2005 Order.

1 Ford Credit argues that the negligent misrepresentation claim
2 must be dismissed as to it because it did not make any
3 misrepresentations. Mot. at 13. This argument is unavailing.

4 First, this is a merits dispute. Moreover, under California
5 law, misrepresentation may also include "concealment" or
6 "nondisclosure." Small v. Fritz Companies, Inc., 30 Cal.4th 167,
7 173 (2003). Secondly, Ford Credit argues that the negligent
8 misrepresentation claim must be dismissed because, as a commercial
9 lender, it owes no fiduciary duty to Daugherty or DLMI. It cites
10 Price v. Wells Fargo Bank, 213 Cal.App.3d 465, 471 (1989) for this
11 proposition. Although the court in Price explained that the
12 relationship between Price and Wells Fargo Bank constituted a
13 debtor/creditor relationship and that a "debt is not a fiduciary
14 relation between debtor and creditor,"¹² that case is
15 distinguishable from the instant matter. It is not clear that this
16 general proposition applicable between a bank and borrower/customer
17 would apply to Ford Credit. Even assuming, without deciding, that
18 Ford Credit's flooring agreement is identical to a banker's
19 obligation to his creditor, the motion must be denied. Even if
20 Ford Credit had no fiduciary duty to Daugherty, it had a general
21 obligation not to engage in misrepresentation, which simply arises
22 out of its business relationship. Accordingly, the court denies
23

24 ¹² See also Lawrence v. Bank of America 163 Cal.App.3d 431,
25 437 (1985) (where a bank customer alleged his bank owed him a
26 fiduciary duty, "under ordinary circumstances the relationship
between a bank and its depositor is that of debtor-creditor, and
is not a fiduciary one").

1 Ford Credit's and Lincoln Mercury's motion to dismiss as to this
2 claim.

3 **C. EIGHTH AND NINTH CLAIMS (FRAUD AS A RELEASE FROM GUARANTY**
4 **AGAINST FORD CREDIT AND VIOLATION OF CONTINUING**
5 **GUARANTEES) (Against Ford Credit)**

6 In their fourth amended counterclaim and third-party
7 complaint, Daugherty and DLMI allege these two new causes of
8 action. Defendants seek declaratory relief releasing them from
9 Ford Credit's Wholesale Guaranty and Promissory Guaranty, because
10 they allege that they have been defrauded.

11 Daugherty alleges that he executed a Wholesale Guaranty and
12 Promissory Guaranty with Ford Credit which "ma[d]e Daugherty
13 personally responsible for certain indebtedness allegedly owed by
14 DLMI to Ford Credit." Id. DLMI and Daugherty contend that the
15 alleged indebtedness of DLMI was "generated by and through a common
16 scheme to raise DLMI's flooring line with Ford Credit, and to have
17 Lincoln Mercury build and deliver vehicles against this increased
18 flooring line, even after the credit had been suspended." Id. at
19 23. These two causes of action redescribe a "common scheme"
20 wherein Ford Credit allegedly acted illegally to "raise DLMI's
21 flooring line credit without DLMI's consent or knowledge." The
22 "fraud" alleged in these two claims relate not to alleged
23 misrepresentations of the market share made by Lincoln Mercury, but
24 about the ordering process of the vehicles that the Board
25 previously addressed. The court must dismiss these two causes of
26 action with prejudice because they are a clear attempt to repackage
claims that "Lincoln Mercury and Ford Credit secretly arranged for

1 ordering and shipping an excess number of cars" and that such
2 actions "caused the DLMI franchise to fail." Significantly, the
3 NMVB previously found not credible Daugherty's denial that he did
4 not request an increase from Ford Motor Credit in his flooring
5 line. See NMVB Decision at 19. Rather, the Board explicitly found
6 that Daugherty was "aware that [his credit line] was being
7 increased due to the shipment of vehicles which were being received
8 and billed to Daugherty's account by Ford Motor Credit" Id. at 19-
9 20.

10 Finally, as the court explained in its October order,
11 allegations relating to a "common scheme" between Ford Credit and
12 Lincoln Mercury to defraud defendants implicate and contradict the
13 facts determined by the NMVB. October 31, 2005 Order at 10-11.
14 Although the scheme is restated within the context of a new legal
15 theory, defendants are collaterally barred from asserting them.
16 See Sutphin v. Speik, 99 P.2d 652, 656 (1940) (collateral estoppel
17 is a bar to a party presenting a new theory with respect to the same
18 issue previously litigated). These two claims alleging fraud with
19 respect to the guarantees between Ford Credit and defendants are
20 dismissed with prejudice.

21 **D. TWELFTH COUNTERCLAIM - VIOLATION OF CALIFORNIA CIVIL CODE**
22 **SECTION 2819 (Against Ford Credit)**

23 California Civil Code § 2819 states in pertinent part:

24 A surety is exonerated, except so far as he or she may
25 be indemnified by the principal, if by any act of the
26 creditor, without the consent of the surety the original
obligation of the principal is altered in any respect,
or the remedies or rights of the creditor against the

1 principal, in respect thereto, in any way impaired or
2 suspended.

3 In their twelfth counterclaim, defendants allege that they are
4 no longer liable under their continuing guarantees because Ford
5 Credit "unilaterally, and in violation of the terms of the finance
6 agreement with DLMI, raised the maximum credit limit available to
7 DLMI, and financed vehicles which were delivered to DLMI with this
8 additional and unauthorized extension of credit." FAC ¶ 147. The
9 counterclaim alleges that Ford Credit was required to "amend" the
10 "finance agreement with DLMI," and to have such agreement "signed
11 by both parties." Id. at ¶ 149.

12 This claim cannot stand because it contradicts the findings
13 of the NMVB, which found that Daugherty ordered the vehicles and
14 that the credit line was increased with his consent. According to
15 the NMVB decision:

16 The claim that there was "no viable funding source" at
17 the time [the vehicles] were delivered is not tenable .
18 . . . Although Mr. Daugherty denies that he requested
19 an increase from Ford Motor Credit in Daugherty's
20 flooring line, he was aware that it was being increased
21 due to the vehicles which were being received and billed
22 to Daugherty's account by Ford Motor Credit.

23 NMVB Decision at ¶¶ 74-75.

24 The Board went on to say that:

25 There is no doubt that Daugherty was aware that these
26 vehicles were being ordered to be built and delivered
27 . . . Daugherty was also aware that they and been
28 financed through Ford Motor Credit as Daugherty
29 received itemized flooring statements showing the
30 deliveries.

31 NMVB Decision at ¶ 91.

1 The Board has already adjudicated this issue and found that
2 Daugherty was aware and most likely consented to the credit
3 increase. The Board explicitly considered and rejected Daugherty's
4 contention that he did not request an increase from Ford Credit.
5 Defendants are collaterally barred from raising this claim now.

6 Finally, it is worth noting that under California law, the
7 Board's findings would preclude defendant from bringing this claim.
8 The California Supreme Court has explained that the logical
9 corollary to Section 2819 is that "where the surety consents to an
10 alteration of the original obligation of the principal, or the
11 impairment or suspension of any of the creditor's rights or
12 remedies against the principal, the surety is not exonerated."
13 Bloom v. Bender, 48 Cal.2d 793, 800 (1957). The Board's factual
14 findings make clear that Daugherty knew of, and consented to, the
15 increase in the credit line by Ford Credit, and thus defendants may
16 not be exonerated from his obligations under the guaranty
17 agreements. Defendants' twelfth claim must be dismissed.

18 **IV.**

19 **CONCLUSION**

20 Ford Credit's and Lincoln Mercury's motions to dismiss are
21 GRANTED in part, and DENIED in part, as follows:

22 1. Lincoln Mercury's motion to dismiss as to claims one,
23 four, and five is GRANTED;

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25 ////

26 ////

